BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: HENSEL PHELPS CONSTRUCTION CO. 420 Sixth Avenue P. O. Box "O" Greeley, CO 80632-0719 Employer	Docket Nos. 01-R2D1-1618 and 1619 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above entitled matter by Hensel Phelps Construction, Co. (Employer) under submission, makes the following decision after reconsideration.

Background and Jurisdictional Information

Employer Hensel Phelps Construction Co., was the general contractor in charge of building the Sheraton Grand Hotel in downtown Sacramento, California. Beginning October 30, 2000, Donald Woosley (Woosley) and Michael Donlon (Donlon), Safety Engineers for the Division of Occupational Safety and Health (Division), began investigating an accident at 1230 "J" Street, Sacramento, California, where Employer maintained a place of employment. On April 25, 2001, the Division cited Employer alleging the following violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations: a serious violation of section 1604.5(c)(3) [hoistway doors not supported and braced as required] and a serious violation of section 1604.2(a)(1) [hoistway doors not capable of withstanding at least 200 lbs. of horizontal force].[1] The Division proposed civil penalties totaling $36,000 for the violations.

Employer timely appealed, contesting the citations on all available grounds and asserting affirmative defenses.

A hearing was held on September 26 and 27, 2002, before an Administrative Law Judge of the Board, at Sacramento, California. At the

[1]Unless otherwise specified, all references are to sections of Title 8, California Code of Regulations.

hearing's outset, the Division moved, without objection, to amend Citation 1 to reclassify the alleged violation from serious to general, and adjust the penalty to $375 based on its determination that proof was lacking to show a substantial probability of serious physical harm from the cited condition. Good cause having been established, the motion was granted. Following the amendment Citation 1, General, section 1604.5(c)(3) and Citation 2, Serious, section 1604.2(a)(1) were the subject of the hearing.

Summary of Evidence

Both citations arose from an October 30, 2000 accident at the hotel, which was under construction at the time. Renato Alcala (Alcala) and Phillip Bohanon (Bohanon), Alcala's foreman, employees of Decorators, Inc., a subcontractor, fell from the 21st floor through the doorway between the building and a personnel hoist or construction elevator (we use both terms in this Decision), both sustaining fatal injuries. That doorway was equipped with a door which ordinarily opened into the building to allow access to the hoist, although when the accident occurred the door swung out into the shaft or hoistway in which the elevator car moved. The personnel hoist was attached to the exterior of the hotel structure during construction; it was a temporary installation and was ultimately removed.

Employer, the general contractor on the project, installed the door on the 21st floor as well as similar doors from the 5th floor and up.

The parties differed on what caused the door to swing outward when the employees fell through, and what amount of force caused it to do so.[2] We refer to the door involved in the accident as the "accident door" frequently but not exclusively in our discussion.

The evidence introduced at hearing by the parties may be viewed as consisting of two types. The first consisted of witness accounts of how the accident happened and what the two decedents were doing immediately before they fell; these accounts contrast starkly on the question of whether the two men were engaged in horseplay. Two eyewitnesses testified at the hearing; the others' accounts were gathered from interviews conducted after the accident. The substance of those interviews was introduced as evidence at the hearing. The second type of evidence was technical in nature and addressed the physical characteristics of the accident door, the method and results of tests performed on similar doors, and testimony about the physics and mechanics of how the accident may have occurred. We first summarize the various witness accounts.

[2] The door was designed to open in to the building structure and was equipped with three strike plates to stop it when it closed by contacting a vertical pipe called a "strike jam" or "pipe jam." The strike jam or pipe jam is analogous to a typical door jam and serves the same purpose, to provide a barrier to limit a door's range of motion. By all accounts, the door swung outward beyond the pipe jam and into the space occupied by the hoistway when the accident occurred.

Eyewitness Daniel Marquez (Marquez), a coworker of Alcala and Bohanon, was called to testify by the Division.[3] According to Marquez, several workers were gathered near the door at the end of a work-day, waiting for the personnel hoist to take them to the ground floor so they could leave for the day. Alcala approached the call box and used it to signal the hoist operator to send the car to the 21st floor. His foreman (Bohanon) then came shortly thereafter to cancel the signal because it was still a bit early.

Up to this point the eyewitness testimony is consistent. The accounts differ about what happened after Bohanon countermanded the call for the hoist.[4]

According to Marquez, as Bohanon moved next to Alcala after speaking into the call box, Alcala backed away from him about a step's distance and contacted the door with his back or shoulder. As Alcala moved backward and leaned against the door, the door unexpectedly and rapidly swung fully open. Alcala lost his balance and began falling into the hoistway. Bohanon attempted to grab Alcala to prevent the fall, but he could not, and he fell out after Alcala.

Marquez testified that neither Alcala nor Bohannon was engaged in any pushing, shoving, or wrestling of any sort before the incident. He said it was not the employees' habit to engage in such activity. He described Alcala as about 5'8" or 5'9" in height, and weighing about 160 pounds. Bohanon was described as a larger man. He added that only Alcala's weight leaned on the door when it opened. After Bohanon fell, the door swung completely back.

Employer offered conflicting evidence about how the fall occurred through testimony of Don Woosley, a former investigator for the Division. Woosley was one of the first investigators to arrive at the scene. His assignment was to interview witnesses and to investigate the accident. Woosley's interviews with non-English speaking witnesses were completed with an interpreter. Before leaving his employment with the Division,[5] Woosley communicated to the Division his opinion that based on his interviews and the statements of some witnesses, the fall was the result of horseplay.

One of the persons Woosley interviewed on the day of the accident was Ken Carter, another of Alcala's co-workers. Woosley described Carter as "noticeably shaken" when he gave his statement immediately after the accident. Woosley informed Carter that it was important to take his statement at that time, while Carter's memory was fresh. Carter stated that Alcala and Bohanon were "kind of involved in a little horseplay or something at that time."

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[3] Marquez testified with the aid of an interpreter, as he is primarily Spanish-speaking.
[4] There was no evidence introduced to confirm that the two calls to the elevator operator were made.
[5] He retired from the Division prior to completion of the investigation and prior to Employer being cited.

We view Carter's statement to be a spontaneous declaration because of the circumstances and time frame in which it was given.[6]

The rationale behind Evidence Code section 1240, allowing admission of spontaneous statements as an exception to the hearsay evidence rule is well established in California law (such statements are made under the excitement of the event and before there is time to fabricate a different version). *Rufo* v. *Simpson*, (2001) 86 Cal.App.4th 573; *Box* v. *California Date Growers Association*, (1976) 57 Cal.App.3rd 266. The exception is used in civil as well as criminal matters, where the burden of proof is much greater than in the instant proceeding. *People* v. *Rincon*, (2005) 129 Cal.App.4th 738*; People* v. *Anthony O.*, (1992) 5 Cal.App.4th 428. The requirements of the rule are satisfied by the circumstances in which Carter made his statement to Woosley. *People* v. *Pirwani*, (2004) 119 Cal.App.4th 770.

Over hearsay objections, Woosley's report of his interview with a member of the fire department a few days after the accident was also received into evidence. The statement was given and signed by an assistant fire chief who stated that based on witness statements he received immediately after the accident, he concluded horseplay caused the accident.[7]

Employer also called Mike Melendez, its project superintendent, to testify. He was the "overall superintendent" in charge of safety on the hotel construction job. He stated that shortly after the accident he interviewed two workers, one being Ken Carter, and made notes of what they said to him. Over the Division's hearsay objection, Melendez testified that Carter related to him that "there was horsing around going on the 21st floor and that the next thing he knew he just saw the door pop open and they both fell out." Melendez' accident investigation notes, indicating that Carter said "Phil [Bohanon] and Renato [Alcala] were playing around" were received into evidence.[8]

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[6] When asked at the hearing about that statement Carter said:
Question: Do you remember a deposition being taken whereby you indicate that prior to the –Mr. Alcala falling out of the door that Mr. Bohanan gave him a kind of a squeeze around the mid section and that he was kind of like a rag doll, Mr. Alcala was kind of like a rag doll?
Answer: That was said on the job site after I was traumatized after what I saw.
Question: But you remember telling somebody something like that at the time while you were traumatized; is that right?
Answer: Yes, yes.

[7] Woosley later added that during the investigation, Carter had been changing his story – sometimes telling him there was "grappling" and sometimes saying there was none. Woosley acknowledged that another percipient witness he interviewed, (Victor Guillen), gave an account that was consistent with Marquez' testimony at the hearing. Guillen was not called as a witness.

[8] Board Regulation 376.2 provides in pertinent part: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." Even if these other statements did not fall within exceptions to the hearsay rule, they are admissible to supplement other evidence, such as Carter's spontaneous statement regarding horseplay. *West Valley Construction Company, Inc.*, Cal/OSHA App. 85-424, Decision After Reconsideration (Nov. 2, 1987).

Carter also testified. He testified that the accident door opened fast, "in less than a bat of an eye." He recanted his prior statement about Alcala and Bohanon engaging in horseplay, although admitting he had made prior inconsistent statements.[9] Carter also testified that Bohanon had been his best friend.

We turn next to the testimony and other evidence regarding the accident door and the tests performed on similar doors after the accident.

Both Citation 1 and 2 allege that Employer failed to protect the employees of Decorators, Inc. from "substandard hoistway doors." Citation 1 states the doors "were not supported and braced as required by" section 1604.5(c)(3) such that "[w]hen subjected to a pressure greater than 100 pounds the hoistway doors deflected more than 1 inch."[10] Citation 2 states that employees were exposed to "hoistway doors that were not capable of withstanding a force of at least 200 pounds applied horizontally as required by" section 1604.2(a)(1).[11]

William Price, a Division senior elevator engineer examined the accident door on November 1, 2000, observed the door and described it thusly:

> It's a plastic hollow core door with a hinge pin that it swings off of and three metal strike plates bolted to it that it strikes against the door jamb with them . . . [The door's purpose is] to maintain a safe environment on the building side of the hoistway . . . Meaning that the intent of the door is to keep anybody from falling through the hole. . . [T]hey were designed to open inward towards the building. There's a pin latch that's used to hold the door to keep it from opening into the building . . .[12] When the door is closed under normal conditions it comes against a round pipe, which is a strike jamb, and these plates are what kept the door from going on through [from swinging outward], yeah. . . The door . . . where the

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[9] After reviewing the transcript of his testimony in this regard, some of which is quoted in footnote 6 above, we do not find Carter's attempt to recant credible.

[10] T8 CCR 1604.5(c)(3)- "Hoistway enclosures and hoistway doors shall be so supported and braced that when subjected to a pressure of 100 pounds applied horizontally at any point, the deflection shall not exceed 1 inch and shall not reduce the running clearance below the minimum required in Section 1604.11(a)." The Citation alleges the doors deflected when subjected to *more than* the force (i.e., 100 pounds) the standard requires them to resist without deflecting more than one inch. This discrepancy was not raised by Employer at hearing, and our Decision After Reconsideration here makes it unnecessary to consider whether the error in the Citation was significant.

[11] T8 CCR 1604.2(a)(1)-The personnel Hoist Safety Orders are supplemented by the General Industry Safety Orders requirements for floor and wall openings, railings and toeboards. The General Industry Safety Orders requirements for wall openings are found in section 3211 and requires that any opening in a wall or partition having a height of at least 30 inches and a width of at least 18 inches, through which a person might fall to a level 30 inches or more below, shall be guarded by a guardrail or other barrier of such construction and mounting that the guardrail or barrier is capable of withstanding a force of at least 200 pounds applied horizontally at any point on the near side of the guardrail or barrier.

[12] Employer's project superintendent testified workers typically gathered near the door, at the landing, to wait for the elevator.

> accident happened, these strike plates were actually located on the other side of the strike jamb, and they were still bolted to the door, showing that the door had been pulled through with these plates still on them. . . They had passed through the strike jamb.

Division District Manager William Estakhri testified that the Division initially "red-tagged" the accident door, issuing an "order prohibiting use" for the initial two days following the accident, then it was released to Employer. The Division never tested the accident door, either during its investigation or afterward.[13]

Estakhri explained that the Division did not test the accident door because it may have been damaged (and thus had its characteristics changed) during the accident, but he never visited the site or examined the door. If distorted, he concluded, it may not have maintained the same strength characteristics it had before the accident, and any test results may have been skewed. Because the Division did not test the accident door, such comments are speculative.[14]

Testimony was offered about tests performed on doors of the same type as the accident door. The Division offered testimony by experts intended to establish by inference that if other doors were found upon testing to violate the safety orders' requirements, then the accident door was also not in compliance with the cited safety regulations. One set of tests was performed by third parties, the others by the Division. As indicated in the testimony about the tests, they were unable to duplicate the conditions necessary to ascertain whether the doors tested were able to satisfy the strength requirements of the safety orders at issue.

As to Citation 1, two types of tests were devised to determine whether the doors met the deflection resistance requirement of section 1604.5(c)(3). The persons conducting the first type of tests were unable to exert a steady force of 100 pounds on the door, and so the tests did not answer that question. The second set involved mounting the door being tested horizontally on a frame built specifically for the test and placing a static vertical load on the door to measure its deflection. The results of this test were that the door tested gradually bent or deflected over time by an amount greater than the one inch specified in the safety order.

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[13] Employer objected to the Division's evidence of various "break-through testing" on doors other than the accident door. As will be discussed below, the objection was proper because the tests were conducted in ways that did not produce probative information regarding the characteristics of the accident door, although we are able to draw negative inferences from them.

[14] It may have been wiser for the Division to have examined the door closely and determined if it could have been fairly tested in its post-accident condition. Employer offered to let the Division test the accident door.

The foundation testimony regarding this test was lacking, however, because it did not show whether the frame built for the test properly duplicated the conditions and dimensions of the framing in place for the accident door. Also, while it may be that testing the door with a vertical load on the door to measure its ability to withstand a horizontal force is technically sound (although the evidence is silent on that question as well), the evidence does not show that the weight of the door itself was factored into the test. In the absence of any evidence that the weight of the door was factored into the test we infer it was not. Therefore, though the door tested ostensibly failed, it is unknown whether the load actually imposed was less than or greater than 100 pounds.[15]

Regarding Citation 2, the Division performed a third set of tests which involved applying tension on other hoistway doors installed in the building to determine if they were capable of "withstanding a force of at least 200 pounds applied horizontally[,]" as required by Safety Order section 1604.2(a)(1). We perceive three failings in those tests.

First, there was uncertainty in the testimony about how accurate the force measurement was; moreover, there was no testimony that the device used to measure the force had been calibrated, let alone calibrated accurately and reliably. Next, and more significantly, the door was said to fail the test when two of the three strike plates on the door pulled past the strike jam at pressures less than 200 pounds.[16] But at that point the door had still not opened, and when the test continued it took over 100 pounds of force to pull the third strike plate past the strike jam. What the test did not answer, and apparently could not have answered as devised, was what additional pressure in addition to the near-200 pounds necessary to pull two of three plates through would have been needed to completely open the door.[17]

We find the test data do not prove the door failed to meet the 200-pound strength requirement. That two of the three strike plates were pulled past the strike jam does not mean the door had opened; it had not. A partial failure is not evidence of non-compliance with the Safety Order, and the test simply did not show what level of applied force would have been needed to pull *all three* strike plates past the jam. (Indeed, we suspect that had a proper test been designed, the incremental resistance of the third strike plate would have been

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[15] We also note that the Safety Order does not specify whether the "horizontal pressure" on the door is a static, dynamic, or impulse load, or for how long it must be resisted. We also assume it refers to a total pressure of 100 pounds on the door, and not pressure over a specific or unit area, such as pounds per square foot.

[16] Donlon testified that two of the doors tested "failed," i.e., two of the three strike plates pulled past the jam, at 190 pounds pressure (as measured), and a third at 155 pounds.

[17] There is again a question of what load conditions the Safety Order is intended to address (static, dynamic, impulse) and over what period of time (constant load, peak load, etc.). Moreover, this test imposed a more or less steadily increasing load until "failure," and there was no testimony as to whether such a test methodology properly and accurately would have tested the strength characteristics of the door.

enough to enable the door to meet the Safety Order's specification, as it was shown to individually withstand more than 100 pounds of pressure.)

Lastly, the accident door was not itself tested, nor was it shown that the "pull-through" tests summarized here were devised to duplicate the dimensions and other relevant parameters of the accident door. Thus the tests were not shown to be representative of the accident door.

Other evidence was received regarding the technical aspects of the accident. Donlon testified that he performed his own tests by pressing a scale horizontally against a wall that led him to conclude that Alcala was incapable of exerting a horizontal force (against the door) even approaching 200 pounds. The force he (Alcala) did exert would have been far less than he (Donlon) exerted in his test. He further concluded that it would take a speed of three times the speed of gravity (3G's) for a 200 pound man to generate 200 pounds of horizontal force from a distance of 2 feet away from the door, which would have been impossible for Alcala to generate, in Donlon's opinion. [18],[19] Donlon opined that the most likely horizontal force Alcala applied, based on Marquez' description of Alcala's position, angle and speed in stepping back ("normal" speed), was 20 to 30 pounds.

We are struck by inconsistencies in the Division's evidence. On the one hand Marquez testified that Alcala merely leaned on the door and was moving slowly, yet the door opened very fast. Carter, too, testified that the door opened in "a bat of an eye." Donlon calculated that Alcala would have exerted a minimal force on the door, about 20 to 30 pounds at most. Yet when the break-through tests were performed on similar doors, it took close to 200 pounds of force to pull *two of three* strike plates past the jam. The Division appears to simultaneously maintain that the accident door opened completely (and rapidly, according to two witnesses at hearing) when a slow moving force of 20 to 30 pounds was imposed on it and that the testing demonstrated that the strike plates on similar doors withstood close to 200 pounds of force. The

[18] Using his (Donlon's) best efforts to shove the scale horizontally against a wall from a standing position, even he was able to exert a force of only about 140 pounds Donlon testified he is 6'2" tall and 220 pounds. Using a basic physics formula of Force = Mass times Acceleration (F=MA), he opined that Alcala could not have exerted even that much force. However, at 3Gs or about 96 feet per second per second acceleration, our arithmetic indicates that a mass of just over 2 pounds would result in a force of 200 pounds. Our calculation is as follows: if F = MA, then 200 = (mass) times 96; mass = 200 divided by 96 = 2.0833 pounds. If, contrarywise, Alcala when leaning on the door would impose a pressure of 20 to 30 pounds as Donlon estimated (being the horizontal component of his total weight), and again applying the F = MA formula, his acceleration would need to be 10 feet per second per second (at 20 pounds) or about 6.67 feet per second per second (at 30 pounds) to produce 200 pounds of force (200/20 = 10; 200/30 = 6.67). Donlon appears to have miscalculated or applied the wrong formula to analyze the problem, since his estimate of the required acceleration is off by a factor of almost 10 at best. Donlon also confused his terminology; gravity is an "acceleration" not a "speed" in the language of physics.

[19] Donlon has a college degree in mechanical engineering, which included course work in physics, and is a licensed professional engineer.

test results and Marquez's testimony cannot be reconciled. The evidence does not add up to a consistent or coherent explanation of the event.[20]

FINDINGS AND REASONS FOR DECISION

Citation 2 Item 1 Violation of Section 1604.2(a)(1)

The Division bears the burden of proving each element of a violation by a preponderance of the evidence, including the applicability of the cited safety order. *Cambro Manufacturing Co.,* Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983). The burden of showing something by a "preponderance of the evidence" simply requires the trier of fact to believe that the existence of the fact is more probable than its nonexistence before s/he may find in favor of the party who has the burden to persuade the judge of the fact's existence. *Concrete Pipe and Products of California, Inc.* v. *Construction Laborers Pension Trust for Southern California*, (1993) 508 U.S. 602. The parties presented conflicting arguments regarding the applicability of section 1604.2(a)(1) and section 3211 to the facts at issue.

The evidence at hearing by all witnesses to the accident was consistent to the extent that the accident door was seen to open very quickly when it was either leaned on by Alcala alone or struck by the combined weight of Alcala and Bohanon. There was no direct evidence presented on what amount of weight or force was exerted on it. As we noted above, the third set of tests performed do not prove the door was in violation of the Safety Order. The testimony at hearing regarding how the accident happened was conflicting. It is at least equally likely as not that the accident resulted from horseplay. If horseplay occurred, it is entirely likely that the Safety Order was not violated.

There are at least two additional negative inferences to be drawn. First, had the Division tested the accident door, it would have had at least some direct evidence about the door's strength characteristics, even if the test were performed in the flawed manner of those actually conducted.[21] In the absence of that testing, we have no such evidence. Second, if the pull-through tests the Division did conduct are representative of the accident door, the accident door would have withstood significantly more force than Donlon testified Alcala could have exerted by leaning on it. That would disprove the Division's contention that the door opened under very little force, and would suggest that other possible explanations are necessary. One of them is the alternative

[20] Another mystery surrounding this accident, as testified to by Marquez, is why Alcala was unable to recover his balance to avoid the fall. Under that version of the event, he was standing about 6 inches from the door (thus leaning at a slight angle from the vertical) and moving slowly. It would seem that under those conditions he would have been able to recover enough balance to avoid falling.

[21] Section 412 of the California Evidence Code provides, "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." While we may not go so far as to "distrust" the Division's evidence, we do find it lacking in probative value.

theory of causation advanced by Employer, namely that the door opened under the combined weight of Alcala and Bohanon.[22]

The law of California requires that when evidence is equally susceptible to two reasonable interpretations, one of which leads to liability and one that does not, the trier of fact is bound to choose the interpretation against the party carrying the burden of proof. *People* v. *Miller* (1916) 171 Cal. 649, 654; *California Shoppers, Inc.* v. *Royal Globe Insurance Company* (1985) 175 Cal. App.3d 1, 45; 31 Cal Jur 3d, Evidence, section 95. As we said in *Webcor Builders*, Cal/OSHA App. 02-2834, Decision After Reconsideration (May 24, 2005):

> The statement of law contained in *Miller* is an accepted corollary of the preponderance of evidence standard and is included in standard criminal and civil jury instructions. (CALJIC § 250.2; BAJI 2.60) In *California Shoppers, Inc.*, the court discussed the general rules characterizing the availability of inferences in the fact finding process, including the rule that "[i]f the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary," (quoting *Reese* v. *Smith* (1937) 9 Cal.2d 324, 328.) [23]

We hold that the Division did not meet its burden of proof with regard to Citation 2 in this case. The evidence does not show by a preponderance that the accident door was not able to withstand a force of at least 200 pounds applied horizontally, and therefore does not establish that it was out of compliance with the Safety Order as the Division alleged.

Citation 1 Item 1 Violation of Section 1604.5(c)(3)

We now focus our analysis on Citation 1, Item 1.[24] Section 1604.5(c)(3) requires hoistway enclosures and doors to be supported and braced to withstand a pressure of 100 pounds horizontally at any point; not deflect in

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[22] Other possibilities which were mentioned without an attempt to prove them were that the door was already "open," i.e., had been moved past the strike jam, or that the strike plates had inadequate overlap with the strike jam.

[23] In *Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001) the Board said: "*preponderance of the evidence* is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." The Board cited *Leslie G* v. *Perry & Associates* (1996) 43 Cal.App.4th 472. Neither *Beutler Heating & Air Conditioning*, Cal/OSHA App. 98-556, Decision After Reconsideration (Nov. 6, 2001) nor *Baldwin Contracting Company, Inc.*, Cal/OSHA App. 97-2648, Decision After Reconsideration (Dec. 28, 2001) stands for the proposition that the Division can establish a safety order violation without satisfying its burden of proof. *Carmona* v. *Division of Industrial Safety* (1975) 13 Cal. 3d 303, which is cited in *Beutler*, generally stands for the proposition that safety orders must be liberally construed to afford worker protection.

[24] As with Citation 2, the Division has the burden of proof regarding Citation 1.

excess of 1 inch; and not deflect sufficiently to reduce the running clearance below the minimum required by Section 1604.11(a).

The citation is for a "deflection" in the door. The definition of "deflection" contained on page158 in the 25th Anniversary Construction dictionary[25] states as follows:

> Deflection (1) A deviation, or turning aside, from a straight line. (2) Bending of a beam or any part of a structure under an applied load. (3) Change in shape or decrease in diameter of a conduit, produced without a fracture of the material.
>
> Webster's 3rd New International Dictionary (1971), page 592 states:
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> Deflect: to turn from a straight course or fixed direction: a: BEND . . .to turn aside; deviate from a straight line or from a position, course or direction.

From the foregoing definitions we note there is a distinct difference between "deflecting" and "giving way." The evidence presented by the Division in support of the citation is that the door gave way. There was no evidence that the door deflected in any manner. The Decision (p.16) seems to equate "deflect" with being forced or pushed open. This is a misinterpretation of the standard.

The evidence at hearing by all witnesses to the accident was consistent at least to the extent that the accident door was seen to open very quickly when it was either leaned on by Alcala alone or struck by the combined weight of Alcala and Bohanon. There was no evidence presented that the door deflected or bent, or to what extent it deflected, or proof of what amount of weight or force was actually exerted on it. On the contrary, Donlon, on behalf of the Division, offered the possibility that the door opened because there was too big a gap between the jamb and the door, which let the strike plates pass through too easily. The Division's testimony was that the accident door did not appear physically different after the incident, so the door itself fails to provide evidence of deflection or deformation. Had it been dented or buckled, it might have supported the idea that it deflected.

We next consider the tests conducted. As noted above, the Division did not explain why applying a *vertical* force on the one door it tested for deflection was a valid method of testing whether the door could withstand a *horizontal* force of 100 pounds. Furthermore, the test conditions were not established to duplicate those of the accident door at the time of the accident, the weight of the door being tested was not considered (it would have been a factor in a vertically-oriented test), measurements were not precise even though the

[25] 8th Edition, Greater Phoenix, Arizona Chapter #98, The National Association of Women in Construction

tolerances involved amounted to fractions of an inch, and even the weight placed on the door was not accurately known. In short, we find the test to be of no value in determining whether the accident door could withstand or did withstand a force of 100 pounds applied horizontally without deflecting more than one inch.

The deflection test, in fact, provides some helpful *negative inferences*. Those tests showed that when loaded with about 100 pounds of weight the door gradually bent over time, and the deflection or sagging increased slowly during the test. But there was no time for the accident door to gradually bend as the test door did under the test conditions. All the evidence was that the accident door opened suddenly. Thus there was no proof that it deflected before it opened, or how much force was exerted on the door. As noted above, the Division did not test the accident door or examine it closely. All that is known with certainty is that it opened.

Similarly, the results of another set of "deflection" tests by a testing firm showed that the door passed the test at 70 pounds and failed at 120 pounds, neither of which proves a violation of the standard, which requires resistance to a 100 pound pressure. No deflection testing was ever performed on the accident door.

Our conclusion is that the Division failed to demonstrate by a preponderance of the evidence that the door was not supported and braced to prevent deflection in excess of one inch when subjected to 100 pounds of pressure applied horizontally. We incorporate by reference the authorities cited above in support.

CONCLUSION BASED ON EVIDENCE

In making this Decision, the Board relies on its independent review of the entire evidentiary record in this case.

As we noted above, the law of California requires a ruling against the party having the burden of proof should the evidence be equally susceptible of two interpretations. *People* v. *Miller* and *California Shoppers, Inc.* v. *Royal Globe Insurance Company*; *supra*; 31 Cal Jur 3d, Evidence, section 95. In this case the Division's evidence is not more likely to be explicative of the accident than Employer's. While the Division did not have to prove how the accident occurred, it did have to prove the door was not in compliance with the Safety Orders as alleged. Based on the record before us, however, we cannot say which of the two causes advanced by the parties was the cause or even the more likely cause of this tragic event.

DECISION

We find that the Division did not prove, by a preponderance of the evidence, that Employer violated Section 1604.2(a)(1) (Citation 2) or Section1604.5(c) (3)(Citation 1).

Employer's appeal is granted and the ALJ's decision is reversed.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: July 6, 2007